TRIAL BY JURY IN UNITED STATES COURTS.

IN the recent case of Slocum *v.* New York Life Insurance Co. (decided April 21st) a majority of the Supreme Court (White, C. J., and McKenna, Day, Van Devanter, and Lamar, JJ.) have given an extraordinary effect to the Seventh Amendment of the Constitution, which declares the right of trial by jury in actions at common law. The case was an action upon a policy of life insurance in the United States Circuit Court in Pennsylvania. At the trial counsel for the defendant asked the court to direct a verdict for the defendant on the ground that there was no evidence of payment of the premium or of any arrangement modifying the terms of the policy. This direction was refused and the jury gave a verdict for the plaintiff. By a Pennsylvania statute [1] it is provided that when "a point requesting binding instructions has been reserved or declined" at a trial, the evidence may be made part of the record and, upon motion for judgment *non obstante veredicto*, such judgment may be entered as shall be warranted by the evidence. The Court of Appeals held that the evidence did not warrant a verdict for the plaintiff and that a verdict for the defendant ought to have been directed, and (following the state practice according to § 914 of the United States Revised Statutes) directed judgment to be entered for the defendant. The Supreme Court also held unanimously that the evidence did not admit of a finding that the policy was in force at the time of the death and that a verdict for the defendant ought to have been directed at the trial. But, as this had not been done, the majority of the court held that a new trial should have been directed, and that the court could not give judgment for the defendant, because the Seventh Amendment provides that,

"in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

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[1] Pa., Laws of 1905, c. 198, p. 286.

It is admitted in the judgment of the majority delivered by Van Devanter, J., that the aim of the amendment was not to preserve mere matters of form and procedure, but of substance. But it is declared that the right to a trial by jury is determined by the pleadings and not by the evidence, and, if an issue of fact is presented by the pleadings, each party is entitled to have it tried by a jury. Although a party is entitled as matter of law to have a verdict against him set aside when the judge at the trial ought to have directed the jury to give a verdict in his favor, yet it is said that the verdict operates under the Constitution to prevent a disposition of the case without a new trial, because a new trial was the only means provided by the rules of the common law for that purpose, and that this right to a new trial is a matter of substance and not of form.

Hughes, J., in delivering the judgment of the minority (Holmes, Lurton, Hughes, and Pitney, JJ.) says:

"The serious and far-reaching consequences of this decision are manifest. Not only does it overturn the established practice of the federal courts in Pennsylvania in applying, under the Conformity Act, the provisions of the state law, but it erects an impassable barrier — unless the Constitution be amended — to action by Congress along the same line for the purpose of remedying the mischief of repeated trials and of thus diminishing in a highly important degree the delays and expense of litigation."

Although it is said by the majority of the court that the right to a trial by jury is determined by an inspection of the pleadings, it is not shown why it is to be determined in that way. The Constitution gives a right to have questions of fact tried by a jury, but it does not say how it shall be ascertained whether there are any such questions. Pleadings are not necessary to show what questions of fact are in dispute, and they are only a part of the forms of procedure.[2] The English rules of court provide in Order 18 A for trials without pleadings. In Nash *v.* Inman,[3] there was merely a writ indorsed with a olaim for £145 10*s.* 3*d.* for clothes supplied

[2] See Thayer, Preliminary Treatise on Evidence, 366–368, on this subject, referring to a report of a committee of the English judges in 1881, of which some further details are given in an interesting note in 4 HARV. L. REV. 184 (1890).

[3] [1908] 2 K. B. 1.

to the defendant, an undergraduate at Cambridge. At the trial, the defendant set up that he was an infant, and the plaintiff contended that the question whether the clothes were necessaries should be submitted to the jury. But the judge held that there was no evidence that they were necessaries, and, without taking any verdict from the jury, directed judgment for the defendant. The Court of Appeal, agreeing with the judge that there was no evidence for the jury, held that it did not matter whether he directed a verdict for the defendant or entered judgment for the defendant. In this case the question of fact to be determined by the jury could not have been ascertained from any pleadings, and the evidence showed that there was no such question. In fact the real questions in dispute generally appear only when the evidence is produced, although there may be a formal issue shown by the pleadings. In the actual case before the Supreme Court there was a statement of claim, alleging the making of the policy of insurance and the death, and containing various details of evidence of an arrangement with an agent about payment of the premium. The plea was "*non assumpsit*," and this presented a formal issue.[4] But the real question in dispute was whether an agreement regarding the premium had been made with an agent which the agent had authority to make. These pleadings gave no more intimation of this question than would have been given by an indorsement on the writ that "the plaintiff's claim is $20,000 upon a policy of insurance upon the life of Alexander W. Slocum deceased." [5] When the evidence was placed upon the record as the statute required, the record showed that there was no question of fact to be tried, as plainly as it would have done if the statement of claim had shown no cause of action.

A question of fact is not capable of being tried without some evidence on one side or the other. If a case, in which the pleadings show an issue of fact, is opened to the jury, and the party having the onus of proof openly admits that he has no evidence whatever to offer, there is no question of fact to be tried. If he offers evidence

[4] The plea was as follows: "And now, to wit, August 11th, 1908, comes the New York Life Insurance Company, defendant above-named, by . . . its attorneys, and pleads non-assumpsit."

[5] This is the form of indorsement authorized by the English rules of court under Order 18 A; see Appendix A, pt. III, s. 2.

that would not justify a verdict in his favor if it were believed, he is in the same position. The judge would direct the jury to give a verdict for the other party, but the jury would not exercise any judgment in the matter and would not try any question of fact.[6] That is not what is meant in the Constitution by a trial by jury. When a verdict is directed in favor of one party on the ground that the evidence does not warrant a verdict for the other party, the case is said to be "withdrawn" from the jury or "not submitted" to the jury.[7] The form of entering a verdict is employed, because that is the most convenient, if not the only, form of proceeding to dispose of the case according to the existing rules. In Sparf and Hansen *v.* United States[8] the Supreme Court quoted with approval Miller and McCrary, JJ., saying,

"It would be a useless *form* for a court to submit a civil case involving only questions of law to the consideration of a jury, where the verdict, when found, if not in accordance with the court's view of the law, would be set aside. The same result is accomplished by an instruction given in advance to find a verdict in accordance with the court's opinion of the law."

If the right to a trial by jury is not denied when the jury are directed to find a particular verdict without being allowed to consider the evidence, it is difficult to see how any such right is interfered with by the entry of a judgment instead of a verdict. There is no difference in substance between the two modes of proceeding, as shown by the English case of Nash *v.* Inman,[9] already mentioned. If the judge at the trial has not directed a verdict when he ought to have done so, it seems only a matter of form and procedure to correct the error by entering judgment for the party in whose favor the verdict ought to have been directed.

It is also shown by Hughes, J., that even the forms of procedure at common law provided a means of questioning the sufficiency of the evidence and obtaining a final judgment without going through the form of entering a verdict, and that this did not differ in sub-

[6] See Curran *v.* Stein, 110 Ky. 99, 103, 60 S. W. 839 (1901) and Cahill *v.* Chicago, Milwaukee, & St. Paul Ry. Co., 74 Fed. 285, 290 (1896), where there was difficulty in inducing the jury to obey the direction.

[7] Marion County *v.* Clark, 94 U. S. 278, 284 (1876); Randall *v.* Baltimore & Ohio R. Co., 109 U. S. 478, 482 (1883); Carter *v.* Carusi, 112 U. S. 478, 484 (1884).

[8] 156 U. S. 51, 105 (1895).

[9] [1908] 2 K. B. 1.

stance from a motion for judgment or to direct a verdict on the same ground. This was the demurrer to the evidence, which fell into disuse, and the practice of moving to direct a verdict took its place, and was tested by the same rules. Van Devanter, J., says, however, that there was a pronounced difference between them, for, on such a demurrer, if judgment is not given for the party demurring, it is necessarily given for his opponent, while, if a motion to direct a verdict is refused, the party may still go to the jury on the evidence. But it will hardly be asserted that a statute permitting him to demur to the evidence *without* thereby losing his right to a verdict from the jury would infringe the provisions of the Constitution. If such a statute would be valid, this distinction vanishes. It is not apparent, therefore, how the Constitution interferes with a statute authorizing a motion for judgment upon the same grounds upon which a demurrer to the evidence was allowed, and an appeal if the motion is refused and the case submitted to the jury.

It is said in the judgment of Van Devanter, J., that the verdict operated under the Constitution to prevent a reëxamination of the issues save on a new trial, and that the Court of Appeals, instead of ordering a new trial, "reëxamined the issues, resolved them in favor of the defendant, and directed judgment accordingly." But the Court of Appeals did not examine or decide any question of fact. It examined the evidence, and decided that there was no evidence that would justify the verdict; and all the judges of the Supreme Court made the same examination and came to the same conclusion. The reëxamination that the Constitution forbids is a new inquiry into the truth of the *facts* ascertained by a verdict. No such examination was made, and, when it was determined that the evidence did not justify a verdict for the plaintiff, the verdict ceased to have any effect and was as if it had never been given, as the learned judge himself says. It is difficult to understand how the Constitution in these circumstances prevented the court from entering judgment for the defendant in accordance with the statute.[10]

[10] A point was made that, if the judge at the trial had intimated that he should direct a verdict for the defendant, the plaintiff might have become non-suit and then brought another action. But the right to become non-suit depends only on rules of practice and derives no support from the Constitution. In Massachusetts

The decision of the majority of the court is a public misfortune, because it destroys a simple means of enforcing, without the expense, delay, and uncertainty of a new trial, a right to which the decision shows that a party was entitled at the trial. There is, however, a way in which the consequences of the decision may be mitigated. The Pennsylvania statute provides only for recording the evidence, when the judge is asked to direct a verdict. If some words were added authorizing also the recording of such alternative or other findings as the judge may think proper to take, then the court on a subsequent motion or on appeal could enter the proper judgment on the alternative finding. For example, in the case just decided, the judge might have directed the jury, if they gave a verdict for the plaintiff, to give also an alternative verdict for the defendant if the court should be of opinion that the evidence did not justify a verdict for the plaintiff. The alternative verdict would be as good as if it had been the only verdict,[11] and nobody could say that the Constitution was infringed by entering judgment upon it. This may seem a mere form, but, if the decision is right, it is a matter of substance. Such a practice would not materially differ from that ordinarily employed in England at common law for many years previously to 1875, by which leave was reserved at the trial to enter the verdict according to the decision of the court upon the questions of law, as explained in Treacher *v.* Hinton,[12] in the King's Bench in 1821. If that practice had been in general use here, a statute authorizing the entry of a judgment, instead of varying the verdict in accordance with the leave reserved at the trial, would never have seemed anything more than a mere change of form.

J. L. Thorndike.

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there never was any such right after the case had been opened to the jury. Shaw *v.* Boland, 15 Gray (Mass.) 571, 572–573 (1860). If such a right existed in Pennsylvania, it was gone when the plaintiff got a verdict, and the case was then subject to the statutory provisions for entering judgment for the defendant if the verdict was not warranted by the evidence.

[11] Walker *v.* New Mexico and Southern Pacific R. Co., 165 U. S. 593 (1897).

[12] 4 B. & Ald. 413, 416–417 (1821). See also Reed *v.* Kilburn Co-operative Society, L. R. 10 Q. B. 264 (1875); Hobbs *v.* London & Southwestern Ry. Co., L. R. 10 Q. B. 111, 113, 125 (1875). The procedure since the Judicature Act is shown by McQuire *v.* Western Morning News Co., [1903] 2 K. B. 100.